(2)

Supreme Court, U.S.
FILED
JAN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1077

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALCAN ALUMINIO DO BRASIL, S.A.,
AND
MANUEL DIAZ,
PETITIONERS,

v.

LERCY D. BENITEZ-ALLENDE, ET AL.,
CARMEN CRUZ DIAZ, ET AL.,
RAMONITA GARCIA ANDINO, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to The United States Court of Appeals For the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

FEDERICO LORA LOPEZ
P.O. Box 4266
Hato Rey, Puerto Rico 00919
(809) 758-4995
Counsel for Respondents

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

15 pp

I

QUESTIONS PRESENTED

1. Whether the exercise of *in personam* jurisdiction by federal courts was improper when the foreign corporation, through its sales representative, shipped almost a quarter million defective pressure cookers into the forum State.

2. Whether questions of evidence applied under familiar legal rules, and factual findings supported by substantial evidence, warrant review by this Court on certiorari.

II

LIST OF PARTIES

The parties to the proceedings below were the respondents, Lercy D. Benitez-Allende and Nestor Javier Matta, both personally and representing the conjugal partnership by both composed, and Rafaela Allende, Carmen Cruz Diaz, on her own behalf and on behalf of the Conjugal Community had with Elpidio Rivera Martinez and/or Elpidio Rivera Martinez on his behalf, and Ramonita Garcia Andino, Ramonita Andino Rosa.

The petitioners were Alcan Aluminio Do Brasil S.A. and Manuel Diaz.

TABLE OF CONTENTS

	Page
Questions Presented	I
List of Parties	II
Opinion Below	2
Jurisdiction	2
Statement of Facts	2
Reasons Why the Writ Should Be Denied	5
I. Two Courts Gave Full Consideration to the Issues, Which Rest on the Particular Facts of This Case. The Petition, in Essence, Seeks a Third Review on Sufficiency of the Evidence	5
A. Jurisdiction	5
B. Evidence-related Claims	8
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Asahi Metal Industry, Ltd. v. *Superior Court of California, County of Solano*, 107 S. Ct. 1026 (1987)	6
Burger King Corp. v. *Rudzewicz*, 105 S. Ct. 2174 (1985)	7
Celotex Corp. v. *Catnett*, 106 S. Ct. 2542 (1986)	8, 9
International Shoe v. *Washington*, 326 U.S. 310 (1945)	8
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1974)	7
United States v. *Johnston*, 268 U.S. 220 (1925)	9
Verlenden B.V. v. *Central Bank of Nigeria*, 103 S. Ct. 1962 (1983)	8
Worldwide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980)	6

Statutes:

28 U.S.C. 1332	2
15 U.S.C. 2072	2

In the
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1077

ALCAN ALUMINIO DO BRASIL, S.A.,
AND
MANUEL DIAZ,
PETITIONERS,

v.

LERCY D. BENITEZ-ALLENDE, ET AL.,
CARMEN CRUZ DIAZ, ET AL.,
RAMONITA GARCÍA ANDINO, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE COURT:

The Respondents Lercy D. Benitez, Carmen Cruz Diaz, and Ramonita Garcia Andino, et al., respectfully pray that this Court deny the Petition To Review the Judgment and Opinion of the United States Court of Appeals for the First Circuit and judgment and jury verdicts of the United States District Court for the District of Puerto Rico.

Opinion Below

The Opinion of the Court of Appeals for the First Circuit rendered on September 20, 1988 (857 F.2d 26), and the judgment of the District Court appear in the Appendix to the Petition.

Jurisdiction

The jurisdiction requisites are adequately set forth in the Petition.

Statement of Facts

Invoking the Federal District Court's jurisdiction pursuant to the diversity statute (28 U.S.C. 1332), and federal question jurisdiction based on alleged violations to the Consumer Products Safety Act (15 U.S.C. 2072(c)), the Respondents-Plaintiffs filed three separate suits which were consolidated for trial purposes. All three won jury verdicts, and after two courts' review, the Petitioners essentially ask this Court to conduct a third canvass of the following facts:

Early in the year 1972, Alcan Aluminio Do Brasil, S.A. ("Alcan"), a Brazilian company, instructed its export advisor, Mr. Erich Schmid, to meet Mr. Manuel Diaz ("Diaz") in San Juan, Puerto Rico to discuss the engagement of Diaz as Alcan's sales representative in Puerto Rico. Diaz, a citizen of the State of Florida and owner of property in Puerto Rico, accepted Alcan's offer and since that date has distributed Alcan's products in the Puerto Rican market among its wholesalers and retailers.

One of the products distributed by Diaz was a pressure cooker manufactured and designed by Alcan under the brand name Rochedo. Between the years 1977 and 1981, Diaz distributed 300,000 Rochedo pressure cookers of which 240,000 were purchased by citizens of Puerto Rico, with the remaining 60,000 being distributed in the states of Florida and New York, communities in which large numbers of Puerto Ricans are found in the continental United States.

Prior to initiating the distribution of its product in the United States, Alcan submitted the pressure cooker to testings by Underwriters Laboratories ("UL") in Illinois, seeking that institution's seal of approval which is generally accepted as the industry's standard. On Alcan's behalf, beginning in 1975 UL conducted various tests of the Rochedo pressure cooker, and due to findings of deficiencies related to maximum operating pressures and cover openings tests, the pressure cooker did not receive the UL approval until 1981 when the deficiencies were corrected. By then Diaz had already distributed in Puerto Rico 240,000 of the non-UL-approved Rochedo pressure cookers.

In the year 1982 Alcan commissioned Battelle Laboratories in the state of Ohio to "evaluate the force required to open the lids on samples of pressure cookers manufactured by Alcan." The tests conducted by Battelle Laboratories on the non-UL-approved pressure cookers concluded that "observations during the experiments indicated that steam and hot water spray present a hazardous condition at internal pressure of 2 PSIG and above. Also the propelled lid may present a hazard at pressures of 4 PSIG and above".

On December 29, 1983 the U.S. Consumer Product Safety Commission ("CPSC") announced through its news release, that in cooperation with Alcan approximately 300,000 pressure cookers were being recalled due to a faulty gasket. Consumers were advised that these cookers would be exchanged for UL-approved cookers if the old ones were returned to a Miami center. Diaz placed an ad in newspapers, published in Puerto Rico, on January 25, 1984 announcing the "voluntary recall".

Prior to the recall, respondents Benitez, Cruz and Garcia suffered injuries as a result of the defects in the Rochedo pressure cookers, and subsequently filed the claims subject of Petition.[1]

---

[1] Before the actions were instituted Respondents sought and obtained from the CPSC copies of the public records compiled by the administrative agency on the Rochedo pressure cookers, including the aforementioned laboratories tests which were submitted with the trial record.

Attempting to avoid trial on the merits, Petitioners filed various separate unmerited dispositive motions, ranging from challenging the court's *in personam* jurisdiction, to failure to include "indispensable parties" (unnamed Puerto Rican wholesalers). For nearly two years after initial filing, the court below entertained and ruled on these motions, and subsequently issued the trial's scheduling order.

Through a Rule 37 motion to compel, Respondents apprised the court that Alcan had yet to provide full answers to interrogatories submitted, to produce documents, and most important, produce the results of tests conducted by yet another U.S.-based research institution.[2] The court was persuaded that this information was vital to a proper presentation of the case, and for Respondents' expert's full opinion. Discovery was reopened for Alcan to comply with the Order entered on the Rule 37 motion.

A jury trial was held, and at the end of the presentation of all evidence, Petitioners moved the court for direct verdict (Rule 50), which was denied. On October 29, 1987 the jury decided for plaintiffs, and judgment was entered on October 30, 1987. Petitioners did not move for a new trial. Both parties appealed to the Court of Appeals for the First Circuit which through an unpublished opinion, dated September 20, 1988, denied all of Petitioners' claims, essentially the same reproduced before this Court, and denied Respondents' appeals in part, and remanded. (Petitioners' Appendix A1-A22).[3]

---

[2] In 1985 Alcan commissioned Arthur D. Little, Inc. in Cambridge, Massachusetts, to evaluate the alleged failures of its pressure cookers.

[3] The issues raised by Respondents' appeal are not before this Court.

Reasons Why the Writ Should Be Denied

I. Two Courts Gave Full Consideration to the Issues, Which Rest on the Particular Facts of This Case. The Petition, in Essence, Seeks a Third Review on Sufficiency of the Evidence.

Petitioners raise numerous issues as alleged errors committed by the two previous courts. Canvassing through the Petitioners' Brief these issues can be reduced to two fundamental claims, as done by the Court of Appeals, namely jurisdiction and evidence-related claims.

A. *Jurisdiction*

The Petitioners ignore and avoid the detailed findings of facts on the jurisdictional issue as articulated by the appellate court in its opinion and judgment of September 20, 1988 (Pet. Appendix A-5). Consistent with the district court, the findings of the appellate court show that the jurisdictional issues are not as complex as perceived by Alcan. In summary, the foreign manufacturer engaged an American sales representative to develop the Puerto Rican market which it favored overwhelmingly over other States, as shown by the fact that 80% of the imported pressure cookers were sold in Puerto Rico. Through the normal channels of trade the foreign manufacturer conducted continuous and systematic pursuit of business in the forum State. The defects in its product surfaced in Puerto Rico, and as a result economic and physical damages have befallen on citizens of the Commonwealth. Thus, the Federal District Court for Puerto Rico was the proper forum for these citizens to bring suit against the manufacturer who has made itself available to the privilege of marketing its product in the United States and Puerto Rico. Its amenability to suit in the forum State is merely the price it pays for the benefits it reaps:

> "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State', *Hanson* v. *Denckla*, 357 U.S. at 253, 2 L.Ed.2d 1283, 78 S. Ct. 1228, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risk is too great, severing its connection with the State. Hence, if the sale of a product of a manufacturer or distributor such as an Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others."
>
> *Worldwide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

Further, Petitioners' reliance on *Asahi Metal Industry, Ltd.* v. *Superior Court of California, County of Solano*, 107 S. Ct. 1026 (1987) does not help the issues raised; on the contrary, it supports the judgments of the courts below:

> "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."
>
> *Asahi*, 107 S. Ct. at 1033.

In the factual setting of this case all of the above elements are present, yet Alcan insists it did not purposefully intend to serve the market since its products are sold worldwide, and it has "no minimum contacts" with the forum State claiming it merely filled orders for sale "FOB–Brazil". Conveniently disregarding the admitted active solicitation of business in Puerto Rico by the sales representative (Diaz), and a clamor of a "new international marketplace", the Petitioners ascribe to the First Circuit "insensitivity" to the rights of foreign nationals for its refusal to accept formalistic business structuring to defeat jurisdiction. The Petition overlooks the fact that it is precisely today's technologies and modern commercial life that determine business transactions without territorial presence. *Burger King Corp.* v. *Rudzewicz*, 105 S. Ct. 2174, 2184 (1985).

Finally, Petitioners perceive a State's interest in protecting its citizens from injuries caused by defective products, through authorization of judicial actions, as equivalent to the imposition of State tax law to a foreign parent corporation.[4] Whether such tax is invalid is not a matter of record in this product liability case; it is not part of the decision below nor is it a question presented by the Petition. The First Circuit Court of Appeals, upon Petitioners' argument that *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1974) was a case on points against the exercise of jurisdiction, merely held that this case does not involve "instrumentalities of commerce" but tort law, "a subject matter that historically belongs to the states."

The Petition does not challenge this historical fact; instead, seeking to be cloaked with a type of immunity not enjoyed by the foreign government or nation under whose laws it has been organized, the privately-owned corporation disregards the

---

[4] Alcan had previously argued that pressure cookers, common consumer objects, were "instrumentalities of commerce" regulated by Congress. *Pet. Appendix A-9.*

legal fact that even commercial activities carried on by the foreign sovereign in the United States can make the sovereign liable in state or federal courts. *Verlenden B.V.* v. *Central Bank of Nigeria*, 103 S. Ct. 1962, 1968-69 (1983).

It is well-settled doctrine that *in personam* jurisdiction over a nonresident is proper only when that party has certain minimum contacts with the forum so that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe* v. *Washington*, 326 U.S. 310, 316 (1945). While Petitioners concede that Puerto Rico's "long arm" jurisdictional statute stretches up to the points allowed by the Constitution, the facts show that the foreign manufacturer's connection with the forum State was such that it could reasonably anticipate being haled into court there. *Worldwide Volkswagen*, supra, at 295. Thus, there are no constitutional issues presented in the jurisdictional claims.

B. *Evidence-related Claims*

Claiming alleged departure by the two courts below from the principles established in *Celotex Corp.* v. *Catnett*, 106 S. Ct. 2542 (1986), Petitioners, in essence, ask for a third review of the trial record.

To sustain the allegations the Petition starts with an obvious misstatement of the record. At page 6 of the Brief, Petitioners recite as an alleged part of the trial transcript a colloquy between Alcan's attorney and Respondents' expert. The fact is that the excerpts are part of a deposition taken on July 2, 1987, *nearly three months before trial*. Omitted from the Brief is the following exchange that took place between the deponent and the attorney:

> "Q. Dr. Soderstrom, have you looked at the data supplied to the plaintiff's attorneys from Alcan that specifies the point at which that pot will explode?"

> "A. What I have from the attorneys and from Alcan in that respect is that I have a lot of literature from them that is all in Portuguese. I believe it is with reference to this pot. I also have some literature from a UL-approved pot *which is not this pot.* I don't have the information concerning that for this particular pot".

Deposition of Dr. Soderstrom at page 15.

This evident withholding of information, along with performance tests on the pressure cookers which were not provided to the Respondents, led to a "Motion To Compel" which was granted by the district court on September 29, 1987 when in clear terms it ordered the Petitioners to comply with discovery obligations.[5] The alleged "departure" did not occur as the *Celotex* opinion does not stand for the proposition that the parties may withhold relevant information, and circumvent discovery rules, in order to avoid trial on the merits.

Finally, the Petition asks this Court to review the effect of a party waiving his right to object to jury instructions and to review jury verdicts—matters which are not recognized grounds for the grant of certiorari.

The present case rests entirely on the facts and appraisal of inferences drawn from the evidence presented at trial, already resolved twice in favor of Respondents. Petitioners ask this Court for a third review of the evidence and the facts, contrary to the rules long established by the court on such matter: "We do not grant a certiorari to review evidence and discuss specific facts". *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Furthermore, the case is of significance only to the parties involved, irrespective of conjectures.

---

[5] Notwithstanding the limitations imposed by the manufacturer's recalcitrance to discovery, at the deposition the expert provided opinions which were fully developed at trial upon production and examination of pertinent data. (Pet. Appendix A-11).

Conclusion

For all the above reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

FEDERICO LORA LOPEZ
P.O. Box 4266
Hato Rey, Puerto Rico 00919
(809) 758-4995
Counsel for Respondents